UNITED STATES OF AMERICA
v.
JACK GARDENER

IBLA 71-288 Decided July 30, 1971

Rules of Practice: Dismissal: Standing to Appeal

An interlocutory decision rendered prior to the promulgation of the current rules of practice, adopted April 15, 1971, is not subject to appeal, and a purported appeal therefrom is dismissed as premature.

Rules of Practice: Dismissal: Standing to Appeal

Although the current regulation, 43 CFR 4.28 (36 F. R. 7189) permits interlocutory appeals in certain limited circumstances, the Board of Land Appeals will not grant permission thereunder for the filing of such an appeal unless it appears that disposition of such appeal may materially advance the final decision. The Board of Land Appeals will rule in such an interlocutory appeal only on the issues appropriate to materially advance the case, e.g., contestee's objection to the place of the hearing to be held.

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| IBLA 71-288 | : | S 077650 |
| UNITED STATES OF AMERICA,<br>Contestant | : | Examiner's Orders |
| v. | : | Appeal dismissed |
| JACK GARDNER,<br>Contestee | | |

DECISION

The contestee in a Government contest initiated against certain mining claims has appealed to the Secretary of the Interior from three actions of the hearing examiner:

1. Notice of hearing dated August 20, 1970, setting the hearing at Yreka, California, for October 22, 1970, at 9 a.m.;

2. Order dated August 28, 1970, captioned "Motion to Dismiss Denied";

3. Order dated September 4, 1970, denying contestee's Motion to Set Aside Hearing set for October 22, 1970, and to change the place of hearing from Yreka to Los Angeles, California.

On May 15, 1970, the contestee filed a Motion to Dismiss and Answer to the contest complaint 1/ issued April 17, 1970, by the Bureau of Land Management, through the manager of the land office at Sacramento, California. The Motion to Dismiss asserted that the contest, and the whole procedure in connection therewith, is unconstitutional and void because under the Constitution all legislative powers are vested in the Congress and the Congress has authority to dispose of and to make all needful rules and regulations respecting the territory or other property belonging to the United States. The contestee quotes from 16 U.S.C. § 478 (1964), which in applicable portion recites that nothing contained therein shall prohibit any person from entering upon such national forests for all proper and lawful purposes,

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1/ The contest complaint asserted the invalidity of certain mining claims on the basis that "Minerals are not discovered within the boundaries of the mining claim in sufficient quantity, quality, and value to constitute a discovery under the mining laws."

including mining activities. The contestee further urges that the supervision and disposal of Government land covered by mining claims lies solely with the Bureau of Land Management and that any intervention by the Department of Agriculture is contrary to law. The contestee also contends that the Forest Service has conceded the validity of the claims by sending the contestee a letter stating that the Forest Service would have no objection if he withdrew his patent application without prejudice, providing the various nonmining uses on the land are terminated or made to conform with the applicable forest laws and regulations. He further asserts that he has made a discovery on the land and suggests that the contest denies the contestee due process of law under the Constitution and the Fifth and Fourteenth Amendments. He requests that the contest be dismissed and that patent issue to the contestee as requested in his application.

The notice setting the hearing at Yreka, California, on October 22, 1970, was issued by the hearing examiner on August 20, 1970.

On August 28, 1970, the contestee filed a Motion to Set Aside the Proposed Hearing, in essence reiterating his contentions, and also filed a motion to change the place of the hearing. He adverted to 5 U.S.C. § 554(b) (Supp. V, 1970) which in part reads as follows:

> In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

The contestee asserts that he and his attorney were not consulted and that no consideration was given for their "convenience and necessity." He concludes that the provisions of the Administrative Procedure Act have not been met. He recites that he is a working man and that to go all the way to Yreka for a hearing means at least two days additional lost time extra expense for him, his attorney, and witnesses. He requested that the hearing set for October 22, 1970, at Yreka be set aside until the motion to dismiss has been determined and if and when the contest hearing is set that it be set for a mutually agreeable date at Los Angeles.

On September 4, 1970, the Examiner sent contestee's attorney a letter denying the motion to set aside the hearing, stating:

> The Government has opposed the motion primarily because you raised potential issues in your answer which may require witnesses living near the claims in Yreka. Possibly you may wish to communicate with

> Mr. Lawrence [the attorney for the United States Department of Agriculture] for the purpose of limiting the issue to the question of discovery and securing a stipulation to the effect that both parties prefer to have the hearing in Los Angeles. Such a stipulation will be acceptable.

Subsequent to the filing of the appeal, on April 15, 1971, the appellate regulations in 43 CFR were amended (36 F. R. 7185, 7189) to provide in part as follows:

> Section 4.28. Interlocutory Appeals.
>
> There shall be no interlocutory appeal from a ruling of an examiner unless permission is first obtained from an Appeals Board and an examiner has certified the interlocutory ruling or abused his discretion in refusing a request to so certify. Permission will not be granted except upon a showing that the ruling complained of involves a controlling question of law and that an immediate appeal therefrom may materially advance the final decision. An interlocutory appeal shall not operate to suspend a hearing unless otherwise ordered by the Board.

This regulation was adopted after the denial of the motions by the examiner. Even if this regulation is deemed to be applicable, it is our view that consideration of the merits of the interlocutory decision at this time would not "materially advance the final decision," other than for consideration of the place of the hearing.

While it is true that the Administrative Procedure Act envisages that due regard will be had for the parties' convenience in setting the time and place for hearing, it is not reversible error that a hearing was set in the county which is the locus of the mining claims in issue. We are not persuaded that such action constituted an abuse of discretion. The claimant's contention that he would lose two days from work in going to a hearing does not, in our judgment, warrant our interposition to change the situs of the hearing. While, concededly, it would have been more appropriate for the examiner to consult with the contestee's attorney as well as the contestant's attorney prior to fixing the time and place of hearing, we are not disposed to interfere with the examiner's judgment on this issue in the light of the logic of having the hearing in the county which is the situs of the mining claims.

Accordingly, the appeal from the actions of the examiner of August 20, 1970, August 28, 1970, and September 4, 1970, is dismissed

without prejudice of the right of the contestee to again address himself to the substance of his other arguments at such time as the examiner rules on the merits of the case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the appeal is dismissed and the case is remanded for appropriate action consistent with this decision.

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Frederick Fishman, Member

We concur:

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Francis Mayhue, Member

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Anne Poindexter Lewis, Member